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PP v. VICTORY CONNECTION & ORS

HIGH COURT SABAH & SARAWAK, LABUAN
RAVINTHRAN PARAMAGURU J
[CASE NO: LBN-44-1-9-2013]
1 OCTOBER 2014

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CRIMINAL LAW: *Money laundering – Offences – Order of forfeiture – Application for – Whether money seized in bank account subject matter of offence under s. 4(1) Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) – Allegation that first respondent sold cigarettes outside duty-free port – Failure to produce genuine book keeping and daily sales record – Whether purported sales of cigarettes to company false – Whether cigarettes sold outside of Labuan duty-free area should be subjected to duty which was not paid – Whether smuggling offence committed – Whether monies should be forfeited under s. 56(1) AMLATFA*

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CRIMINAL PROCEDURE: *Forfeiture – Forfeiture order – Application for – Offence of money laundering – Whether money seized in bank account subject matter of offence under s. 4(1) Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) – Allegation that first respondent sold cigarettes outside duty free port – Failure to produce genuine book keeping and daily sales record – Whether purported sales of cigarettes to company false – Whether cigarettes sold outside of Labuan duty free area should be subjected to duty which was not paid – Whether smuggling offence committed – Whether monies should be forfeited under s. 56(1) AMLATFA*

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The Public Prosecutor ('the applicant') applied under ss. 56(1) and 61(2) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA') for an order of forfeiture of the monies of the first respondent company, Victory Connection Sdn Bhd, amounting to RM940,884.41 held in its Public Bank Account No. 310701317. The second and third respondents were directors of the first respondent. The applicant's case was that the money seized in the bank account of the first respondent was the subject matter of an offence within the meaning of s. 4(1) of the AMLATFA. The investigating officer's findings allegedly showed that the monies in the said account were deposited or paid by cheque from Miri or Limbang which was located in a Principal Customs Area unlike Labuan which was a duty-free area. It was submitted, however, that the first respondent did not produce any genuine book keeping and daily sales records in Labuan that matched the sales in question for which the monies were banked into their account. The applicant argued that the purported sales of large quantities of cigarettes to a company in Labuan by the name of Billion Nova Sdn Bhd ('Billion Nova') were false. The inference that the applicant urged the court to draw was that the cigarettes were sold outside of Labuan duty-free areas, namely Miri and Limbang, and were therefore subjected to duty which was not paid. The respondents, however, submitted that it was incumbent on the applicant to

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prove on a balance of probabilities that the monies in the Public Bank account in question was the subject matter or was used in the commission of an offence under s. 4(1) of the AMLATFA. The respondents also proceeded to submit that the applicant had not tendered an iota of evidence to support the claim that the respondents sold cigarettes outside of Labuan.

Held (allowing application):

(1) The investigating officer had seized crucial documents from various parties and did not find any matching sales invoices that could support the first respondent's case that the deposits and cheques in question were related to sales to Billion Nova. The creditor statement of Billion Nova did not disclose sales in Labuan that matched the amount of money transmitted from Miri into the account of the first respondent. The manager of Billion Nova also denied making large purchases from the first respondent and denied 12 transactions that the first respondent alleged took place between the two companies. Furthermore, many of the sales transactions were not evidenced by sales invoices in the name of Billion Nova but merely by 'cash bills' that did not bear the name of the purchaser. (para 18)

(2) According to the investigating officer, the total unaccounted cigarettes sales found in the books of the first respondent where payment was made by way of cheques and cash deposits in Miri and Limbang between 2009 and 2011 amounted to RM896,009. The probabilities were in favour of concluding that a smuggling offence had been committed by the first respondent and that the monies in the bank account in question were the subject matter of the offence. The first respondent had falsified their books to create an impression that large quantities of cigarettes were sold to Billion Nova in Labuan to account for sales that were made outside Labuan. Insofar as the payments from Limbang were concerned, there was no reason for the said payments if the cigarettes were sold in Labuan. Therefore, a reasonable inference could be drawn that the cigarettes were sold outside of Labuan and that was the reason the cash deposits were made from Limbang. (para 20)

(3) The burden on the applicant were merely to prove on a balance of probabilities to support their case that the monies were obtained as a result of or in connection with an offence under sub-s. 4(1) of the AMLATFA. The applicant had successfully tendered copious accounting evidence to prove its case. The issues raised by the respondents did not cast doubt on the conclusion that the monies in question were the subject matter of a smuggling offence. Hence, this court ordered the monies in the Public Bank Account No 3102701317 amounting to RM940,884.41 be forfeited under s. 56(1) of the AMLATFA. (paras 21, 23 & 24)

Legislation referred to:
Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 3(1), 4(1), 56(1), (4), 61(2)
Customs Act 1967, ss. 135(1)(g), 158

For the applicant - Aida Mastura (Noor Zalizan with her); DPPs
For the respondents - JM Martin; M/s JM Martin & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru J:

[1] The applicant in this case is the Public Prosecutor. The application is under ss. 56(1) and 61(2) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (Act 613) (hereinafter referred to as AMLATFA). The applicant has applied for an order of forfeiture of the monies of the first respondent company (Victory Connection Sdn Bhd) amounting to RM940,884.41 held in its Public Bank Account No. 310701317. The second and third respondents are directors of the first respondent. The ground of the application is that such property had been obtained as a result of or in connection with an offence under s. 4(1) of the AMLATFA.

Case For The Applicant

[2] The notice of motion of the Public Prosecutor is supported by the affidavit of Deputy Public Prosecutor Aida Mastura binti Mohamed Aman affirmed on 12 September 2013 and the affidavits of the investigating officers Ibrahim Md Nor affirmed on 12 September 2013 and Hasrul Najib bin Hashim affirmed on 19 September 2013. According to the applicant, the first respondent was investigated for an offence under s. 135(1)(g) of the Customs Act 1967. The provision reads as follows:

> Whoever is in anyway knowingly concerned in any fraudulent evasion or attempt at fraudulent evasion of any customs duty, or in evasion or attempt at evasion of any prohibition of import or export.

[3] However, the Public Prosecutor did not charge any individual or company upon completion of the investigation. Instead, the Public Prosecutor has elected to proceed against the monies of the first respondent company that is held in their bank account on the ground that the monies had been obtained as a result of or in connection with an offence under s. 4(1) of the AMLATFA. Section 4(1)(a), in part, reads as follows:

> Any person who:
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> (a) engages in, or attempts to engage in; or
>
> (b) abets the commission of,

money laundering, commits an offence and shall on conviction be liable to a fine not exceeding RM5 million or to imprisonment for a term not exceeding five years or to both.

[4] In s. 3(1) of the AMLATFA, money laundering means the act of a person who:

(a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;

[5] In s. 3(1) of the AMLATFA, unlawful activity means:

"unlawful activity"

means any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence;

[6] In s. 3(1) of the Act, serious offence means:

(a) any of the offences specified in the Second Schedule; …

[7] In the Second Schedule, a smuggling offence under s. 135 of the Customs Act 1967 is included as a serious offence. The applicant's case is that the money seized in the bank account of the first respondent is the subject matter of an offence within the meaning of s. 4(1) of the AMLATFA. The investigating officer's findings as set out in his affidavit revealed the following. The monies in the said account were deposited or paid by cheque from Miri or Limbang which is located in a principal customs area unlike Labuan which is a duty free area. However, the first respondent did not produce any genuine book keeping and daily sales records in Labuan that matched the sales in question for which the monies were banked into their account. The applicant argued that the purported sales of large quantities of cigarettes to a company in Labuan by the name of Billion Nova Sdn Bhd were false. The inference that the applicant urged the court to draw is that the cigarettes were sold outside of Labuan duty free area, namely Miri and Limbang and were therefore subject to duty which was not paid. The applicant also urged the court to ignore the denials of the second and third respondents in their affidavits that the first respondent sold cigarettes outside of Labuan. The reason is that they had deposed that all the business transactions of the first respondent were conducted by one Hiew Shui Ming alias Alex and they were only paid commission for the sales. Therefore, the first and second respondents could not have knowledge of the transactions.

Case For Respondents

[8] The respondents have objected to the forfeiture of the monies in question on the following grounds. Counsel for respondents submitted that it is incumbent on the applicant to prove on a balance of probabilities that the monies in the Public Bank account in question was the subject matter or was used in the commission of an offence under s. 4(1) or for a terrorism

financing offence. Counsel for respondents then proceeded to submit that the applicant had not tendered an iota of evidence to support the claim that the respondents sold cigarettes outside of Labuan.

[9] The first point raised by counsel for respondents is that goods sold in Labuan are non-dutiable under s. 158 of the Customs Act 1967. Counsel for respondents then referred to the affidavit of the second respondent wherein the second respondent stated that all business activities of the first respondent company were handled by him and that all transactions were made and concluded in Labuan. Counsel for respondents submitted that the two statements of the second respondent given to the investigating officer were not exhibited in the affidavit of the investigating officer. He urged the court to invoke adverse inference as the two statements were deliberately not included. Counsel for respondents said that in the statements, the second respondent had stated that the buyers of the cigarettes were not from Labuan. However, the investigating officer did not inquire whether the sales transaction occurred in Labuan. Counsel for respondents argued, *albeit* hypothetically, that if the purchasers were from Langkawi or another duty free area, duty is not payable.

[10] The second point canvassed by counsel for respondents is that the affidavit of the Customs Officer Ibrahim Mohd Noh affirmed on 12 September 2013, states that the first respondent carried on the business of selling cigarettes in Labuan. In the premises, counsel for respondents submitted the applicant had admitted that the cigarettes were sold in Labuan.

[11] The third point of counsel for respondents is in respect of the finding of the investigating officer that:

(i) deposits were made into the account of the first respondent from outside Labuan, ie, Miri and Limbang; and

(ii) that the book keeping records of the first respondent that showed that Billion Nova Sdn Bhd bought large quantities of cigarettes in Labuan were falsified.

[12] Counsel for respondents submitted that there is no presumption in AMLATFA which provides that if deposits are made from outside Labuan, then it is presumed that the cigarettes were also sold outside Labuan. He said the burden is on the applicant to prove that the sales did not take place in Labuan. He also submitted that there is no presumption in AMLATFA that if a company possesses receipt vouchers which only refers to cash sales, then it is presumed that the sales were made outside Labuan. He said that there is no burden on the respondents to prove that the sales actually occurred in Labuan. Counsel for respondents said that the statement of Hiew Shui Ming alias Alex who conducted sales on behalf of the first respondent was not exhibited by the applicant.

Decision

[13] Section 56 of the AMLATFA reads as follows:

> (1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no applicant or conviction for an offence under sub-s. 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under sub-s. 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.
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> (2) The judge to whom an application is made under sub-s. (1) shall make an order for the forfeiture of the property if he is satisfied:
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> (a) that the property is the subject-matter of or was used in the commission of an offence under sub-s. 4(1) or a terrorism financing offence or is terrorist property; and
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> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
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> (3) Any property that has been seized and in respect of which no application is made under sub-s. (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.
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> (4) In determining whether or not the property has been obtained as a result of or in connection with an offence under sub-s. 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

[14] Section 61 provides that the court may return the property to a third party claimant if the said claimant has legitimate legal interest in the property. Section 61(2) reads as follows:

> (2) The court making the order of forfeiture under section 55 or the judge to whom an application is made under subsection 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

[15] As s. 56(1) is subject to s. 61, the court is empowered to make the order of forfeiture only after considering whether any third party has a claim on the properties that had been seized. In the instant case, after the monies in the Public Bank account of the first respondent were seized and the s. 56(1) order was gazetted, no third party came forward to make a claim to the same. Therefore, the only question is whether the seized properties are the subject matter of a serious offence. The DPP and counsel for respondents are on

common ground that burden on the applicant to prove that the seized properties are the subject matter of a serious offence is the civil standard in accordance with s. 56(4) which reads as follows:

> (4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

[16] I shall now consider the evidence adduced by the applicant to support their case and the evidence in denial of the respondents.

[17] Simply stated, the application is for an order of forfeiture of the monies of the first respondent on the ground that it is subject matter of the commission of the predicate offence of smuggling, namely cigarettes. As I stated earlier, the standard of proof that the applicant is required to discharge in establishing the monies in question are the subject matter of a smuggling offence is on a balance of probabilities. In the premises, the applicant is not required to prove beyond reasonable doubt that the respondents were involved in smuggling cigarettes from Labuan to the mainland. As submitted by the learned DPP, the proceedings are not against any individual but against the property that been seized. I shall now consider the evidence tendered in this case.

[18] The investigating officer had seized crucial documents from various parties. He had seized the bank statement of the first respondent. He had seized the book keeping records and cash sales record of the first respondent during the material period. He had also seized the records of Billion Nova Sdn Bhd which is a company based in Labuan because the respondents had alleged *via* their book keeping records that large quantities of cigarettes were sold to the said company. However, the investigation by the authorities revealed the following. A large amount of money was deposited directly into the account of the first respondent from Miri. The deposits included transactions of RM119,467 in 2009, RM61,089 in 2010 and RM84,361. Therefore, the total sum deposited from Miri was RM264,917. Two transactions involved payment *via* cheques while the rest involved cash deposits into the Public Bank account of the first respondent. During investigation, the investigating officer had found that the cigarettes in respect of the said transactions were sold to Billion Nova Sdn Bhd on credit. The investigating officer proceeded to seize the books of Billion Nova Sdn Bhd including its creditor statement. However, the creditor statement of Billion Nova Sdn Bhd does not show that it had made such purchases from the first respondent during the material period. It is also not disputed that Billion Nova Sdn Bhd has no branch in Miri. Moreover, the two cheques made out in favour of the first respondent and deposited in Miri were issued by two individuals who are not directors of Billion Nova Sdn Bhd and have apparently nothing to do with the said company. The investigating officer

could not even trace them. Furthermore, their residential address is in Miri. The investigating officer did not find any matching sales invoices that can support the case of the first respondent that the deposits and cheques in question were related to sales to Billion Nova Sdn Bhd in Labuan. The creditor statement of Billion Nova Sdn Bhd did not disclose sales in Labuan that matched the amount of money transmitted from Miri into the account of the first respondent. The manager of Billion Nova (Toh Kah Ming alias Cynthia) denied making large purchases from the first respondent. She only admitted to making small purchases. The manager of Billion Nova Sdn Bhd also pointedly denied 12 transactions that the first respondent alleged that took place between the said two companies between 2009 and 2011 (referred to in para. 7 of the affidavit dated 18 December 2013). These dubious transactions are related to the two cheques allegedly issued from Miri and the three deposits made from the same place. Thus the explanation of the first respondent that the deposits and cheques were the result of sales to Billion Nova Sdn Bhd as stated in their book keeping records is unbelievable. Furthermore, many of the sales transactions are not evidenced by sales invoices in the name of Billion Nova Sdn Bhd but merely by 'cash bills' that do not bear the name of the purchaser. As the learned DPP submitted, if it is true that there were actual sales to Billion Nova Sdn Bhd in Labuan, it would have been normal practice to issue invoices that carry the name of the purchaser. Moreover, the investigating officer found that the alleged sales were not accompanied by delivery orders as is the normal practice in goods sold and delivered cases.

[19] Similarly, the investigating officer found that over six hundred thousand ringgit had been deposited into the account of the first respondent from Limbang which is not a duty free area. The transactions in question included a sum of RM134,611 in 2009, a sum of RM326,449 in 2010 and a sum of RM170,031 in 2011. The total sum deposited *via* Limbang was RM631,091. The payments were made through cash deposits and cheques. The investigation into the books and daily sales of the first respondent revealed that payments were made by one Ngu Kiong Hoh alias Ah Peng. Ngu admitted issuing the cheques in question. He said in his statement during investigation that he paid for cigarettes that were purchased through the ferry crew that came from Labuan. However, Ngu denied making cash deposits into the Public Bank account of the first respondent in Limbang in his statement which is exhibited in the affidavit of Ibrahim Mohd Noh dated 12 September 2013. Ngu also told the Ibrahim Mohd Noh that he did not operate any business in Labuan.

[20] According to the investigating officer, the total unaccounted cigarettes sales found in the books of the first respondent where payment was made by way of cheques and cash deposits in Miri and Limbang between 2009 and 2011 amounted to RM896,009. I agree with counsel for respondents there is no presumption in law that merely because payments for the duty free

goods were made from outside Labuan, it must be deemed that a smuggling offence had been committed. However, in my judgment, the probabilities are in favour of concluding that a smuggling offence had been committed by the first respondent and that the monies in the bank account in question are the subject matter of the offence. As I said earlier, the affidavits of the investigating officers who went through the book keeping records and daily sales of the first respondent, it was proved that the first respondent could not match the deposits from Miri with the purported sales in Labuan to Billon Nova Sdn Bhd. Therefore, the only inference that can be drawn is that the first respondent had falsified their books to create an impression that large quantities of cigarettes were sold to Billion Nova Sdn Bhd in Labuan to account for sales that were made outside Labuan. Apart from the denial of the manager of Billion Nova Sdn Bhd, there is no other reason why payment should have been made *via* Public Bank branch in Miri. It was not disputed that Billion Nova Sdn Bhd is not running any outlet in Miri. Insofar as the payments from Limbang were concerned, again there is no reason for the said payments if the cigarettes were sold in Labuan. In fact, Ngu alias Ah Peng denied all the cash transactions. Therefore, a reasonable inference can be drawn that the cigarettes were sold outside of Labuan and that is the reason the cash deposits were made from Limbang.

[21] Counsel for respondents raised some issues which to my mind do not cast doubt on the conclusion that the monies in question are the subject matter of a smuggling offence. Customs Officer Ibrahim Mohd Nor said in his affidavit affirmed on 12 September 2013 as follows:

> Hasil dari siasatan saya, Responden Pertama yang beralamat di IR 2/17 Saguking Warehouse 87008 Warehouse 87008 Labuan, Wilayah Persekutuan menjalankan perniagaan mengimport rokok berjenama Salem, Winston dan Mild Seven (selepas in dikenali sebagai "rokok") daripada sebuah Syarikat yang dikenali sebagai Ultico Marketing Sdn Bhd beralamat di 27-2, Jalan Radin Anum, Bandar Baru Seri Petaling, 57000 Kuala Lumpur dan menjual Rokok tersebut di dalam kawasan Labuan …

[22] Counsel for respondents submitted that the above averment means that the applicant has admitted that the first respondent sold cigarettes in Labuan and not in the mainland. In my opinion, the above submission is absolutely devoid of merit. If the affidavit is read as a whole, the averment that the first respondent sold cigarettes in Labuan is purely introductory of the first respondent's business as submitted by the DPP. This is because the first respondent is based in Labuan and is supposed to sell duty free cigarettes in Labuan.

[23] Counsel for respondents also queried why the applicant did not exhibit the statement of Hiew Shui Ming alias Alex given during investigation. In my opinion, there is no reason to invoke adverse inference against the applicant. The burden on the applicant was merely to prove on a balance of probabilities to support their case that the monies were obtained as a result

of or in connection with an offence under s. 4(1) of the AMLATFA. The applicant had tendered copious accounting evidence to prove its case. There is no evidence that the statement of Hiew Shui Ming alias Alex was suppressed or not made available to the respondents. In fact, although Hiew Shui Ming alias Alex was not a director of the first respondent, he had been allowed by the court to affirm an affidavit in his capacity as manager on behalf of the respondents to deny that the first respondent was involved in the offence of smuggling. In the premises, the respondents could not be prejudiced merely because the statement of Hiew Shui Ming alias Alex denying any wrongdoing was not exhibited in the affidavit of Customs Officer Ibrahim Mohd Nor.

[24] In conclusion, for all the above reasons, I am satisfied that the applicant has proved on a balance of probabilities that the monies in the Public Bank account in question had been obtained as a result of or in connection with an offence under s. 4(1) of the AMLATFA. I shall therefore order the monies in the Public Bank Account No. 3102701317 amounting to RM940,884.41 belonging to Victory Connection in Public Bank, Labuan branch and any additional sum in the account which was frozen on 21 September 2012 to be forfeited to the Government of Malaysia under s. 56(1) of the AMLATFA as prayed.